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No. 02-1028

# In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

*v.*

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary is bound by liability limitations in the intermediary's bill of lading, or those in the bill of lading that a subcontracting ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. Petitioner seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit that allows a cargo owner to recover damages from a railroad without being limited by either the cap on carrier liability in the bill of lading to which the cargo owner agreed, or the similar cap incorporated into the railroad's contract for transport. This case presents legal questions that divide the courts of appeals. Furthermore, practical realities prevent satisfactory contractual solutions to that legal uncertainty. This Court's review therefore is warranted.

### STATEMENT

1. A bill of lading is a contractual document recording that a carrier has received certain goods from a shipper and "govern[ing] the relationship of the parties before delivery of the goods." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 60 (3d ed. 2001). Since the 19th Century, it has been "prevalent practice for [maritime] common carriers

to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534-525 (1995). Historically, however, such clauses were not uniformly enforceable in all nations. See Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-143 (2d ed. 1975); 2 Thomas J. Schoenbaum, *supra*, at 75. The result was a "distressing lack of uniformity in shipping practice and law," which prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." *Ibid.*

Those efforts led to the Hague Rules of 1921, which were adopted with minor modifications by international convention in 1924. See International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. App. 1300 *et seq.*). See generally *Vimar Seguros*, 515 U.S. at 536-537; Grant Gilmore & Charles L. Black, Jr., *supra*, at 143-144.

COGSA governs "[e]very bill of lading * * * for the carriage of goods by sea to or from ports of the United States, in foreign trade[.]" 46 U.S.C. App. 1300. It guarantees shippers rights against common carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. See 46 U.S.C. App. 1302-1304. Of particular relevance here, COGSA establishes a default rule that limits carrier liability "for any loss or damage to or in connection with the transportation of goods" to no more than $500 per package, "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. App. 1304(5). COGSA permits the carrier and shipper to agree to a higher liability cap, but not a lower one. 46 U.S.C. App. 1304(5). In practice,



bills of lading usually incorporate COGSA's $500-per-package liability limitation. Shippers pay a reduced transport rate that reflects the carriers' reduced risk and obtain private insurance for the excess value of their goods. See Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000); Ass'n of Am. R.R. Br. 10-11.

COGSA regulates the carriage of goods "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. App. 1301(e). But COGSA permits the carrier and shipper to agree to terms concerning the carrier's liability for loss or damage before or after that time. See 46 U.S.C. App. 1307. Under that authority, carriers and shippers routinely extend the applicability of COGSA's provisions by contract. A so-called "Clause Paramount" in a bill of lading extends COGSA's liability rules beyond the time during which the goods are on the ship. A "Himalaya Clause" extends the benefit of COGSA's liability limitation (or other liability limitations enjoyed by the carrier) to parties other than the carrier itself. See Pet. App. 5a. The vast majority of modern maritime bills of lading include a Himalaya Clause. See Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 Tul. Mar. L.J. 177, 180 (1991) ("The Himalaya Clause, or some similar provision extending the carrier's rights and immunities to third parties, is now standard fare in bills of lading.").

2. a. Respondent James N. Kirby Pty Limited (Kirby) contracted with International Cargo Control Pty Ltd. (ICC) for "through" (*i.e.*, end-to-end) transportation of machinery, valued at more than $2 million, from Sydney, Australia, to Huntsville, Alabama. Pet. App. 2a, 3a, 27a; Br. in Opp. 4. ICC issued Kirby a bill of lading that designates Sydney as the place where ICC received the goods and the port of loading; Savannah, Georgia, as the port of discharge from the ship; and Huntsville (a city more than 300 miles inland from Savannah) as the place of delivery. Pet. App. 66a.

The ICC/Kirby bill limits ICC's liability under COGSA to $500 per package and otherwise caps ICC's liability for loss or damage to the goods. See Pet. App. 67a, Cl. 8.1 through 8.9 (reprinted at Pet. App. 57a-58a); see also Pet. App. 5a; Pet. 7; Br. in Opp. 4. The bill also contains a Himalaya Clause that extends the benefits of the bill's limitations on carrier liability to entities other than ICC itself. Pet. App. 3a; see *id.* at 67a, Cl. 10.1. To obtain additional protection against loss or damage to its machinery, Kirby insured the cargo with the predecessor of respondent Allianz Australia Limited. See *id.* at 4a n.4; Br. in Opp. 5 n.4.

b. An ocean shipping company known as Hamburg Sud subcontracted with ICC to transport Kirby's machinery from Sydney to Huntsville. Pet. App. 3a-4a. Hamburg Sud issued ICC a bill of lading for the cargo. See *id.* at 68a; see also *id.* at 61a-64a (excerpts from Hamburg Sud bill). The bill committed Hamburg Sud to "provide transportation to/from sea terminal and [specified] inland points, which may well involve transport by rail," *id.* at 61a, Cl. 4. The bill incorporates COGSA's $500-per-package limitation, *id.* at 63a-64a, Cl. 17, and contains a Clause Paramount, *id.* at 62a, Cl. 4.d.

The Hamburg Sud/ICC bill also includes a Himalaya Clause extending Hamburg Sud's contractual protections to other parties. That clause allowed Hamburg Sud to "subcontract on any terms the whole or any part of the carriage" of Kirby's cargo, Pet. App. 62a, Cl. 5.a, and states that "all exemptions, limitations of, and exonerations from liability" provided under the Hamburg Sud/ICC bill "shall be available to" Hamburg Sud's agents and subcontracting parties, including "all participating (including inland) carriers." *Id.* at 63a, Cl. 5.b.

c. Hamburg Sud's ship carried Kirby's machinery from Sydney to Savannah, where Hamburg Sud (or a subsidiary of Hamburg Sud) hired petitioner to carry the cargo by rail to Huntsville. Pet. App. 4a & n.3. Petitioner carried the cargo under a contract that incorporated the terms of the bill of



lading that Hamburg Sud had issued to ICC. *Id.* at 4a. Petitioner's train derailed between Savannah and Huntsville, damaging Kirby's machinery. Kirby recovered from its insurer/co-respondent for the loss. *Id.* at 4a n.4.

3. Respondents sued petitioner in the United States District Court for the District of Georgia, alleging breach of contract and tortious negligence and recklessness, among other claims. Pet. App. 4a; see C.A. E.R. Tab 24, paras. 14-24, 31-35 (Second Amended Complaint). Petitioner raised as a defense the $500-per-package limitation contained in the Hamburg Sud/ICC bill, which, petitioner argued, protected it as a subcontractor of Hamburg Sud. See Pet. App. 29a, 31a-32a.

The district court determined that respondents' claims against petitioner are subject to the liability limitation in the Hamburg Sud/ICC bill of lading, because that was the contract under which petitioner "contracted and performed." Pet. App. 37a. The Hamburg Sud/ICC bill, the court further concluded, unambiguously extends its $500-per-package limitation to an inland carrier providing transport to Huntsville. *Ibid.* Accordingly, the district court determined that petitioner's liability is limited to $500 for each of ten "packages" of machinery, or $5000. *Id.* at 38a.

The district court certified its decision for immediate appeal under 28 U.S.C. 1292(b). See Pet. App. 21a-26a.

4. The United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a. The court of appeals first expressed the view that the inland-carrier liability limitation in the Hamburg Sud/ICC bill is binding on Kirby only if ICC was "acting as Kirby's agent when it entered the shipping contract with Hamburg Sud." *Id.* at 6a. Thus, the court stated, whether ICC was acting as Kirby's agent when it received Hamburg Sud's bill is "the pivotal question." *Id.* at 7a.

Turning to that question, the court determined that ICC did not act as Kirby's agent when it contracted with Hamburg Sud, and, therefore, ICC could not have limited Kirby's

recovery from petitioner by accepting Hamburg Sud's bill of lading. Pet. App. 7a-11a. The court reasoned that if ICC had acted as Kirby's agent, then Hamburg Sud's bill of lading would list Kirby as the shipper, whereas the bill actually lists ICC as the shipper. *Id.* at 7a-8a, 9a. Similarly, the court said, Kirby would not have contracted with ICC for through transport, if ICC was Kirby's agent. *Id.* at 8a. The court noted that the ICC/Kirby bill of lading is based on standard terms that are intended for use by shipping intermediaries when they operate as carriers with respect to shippers. *Id.* at 8a-9a. Finally, the court stated that "absent special particular arrangements" establishing an agency relationship, an intermediary that arranges for the carriage of cargo "is considered as an independent contractor" that cannot contractually bind the shipper. *Id.* at 9a (quoting *Naviera Neptune S.A.* v. *All Int'l Freight Forwarders, Inc.*, 709 F.2d 663, 665 (11th Cir. 1983)). The court of appeals therefore concluded that Kirby is not bound by the provisions of the ICC/Hamburg Sud bill of lading, and petitioner cannot invoke the liability limitations in that bill against Kirby. *Id.* at 10a-11a.

The court of appeals next determined that petitioner is not protected by the liability limitation in the ICC/Kirby bill of lading because the Himalaya Clause in that bill "does not specifically identify [petitioner] as a member of a well-defined class of its beneficiaries." Pet. App. 11a; see *id.* at 11a-13a. The court stated that when a Himalaya Clause does not specifically describe a party, the Eleventh Circuit denies that party protection unless there is "privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 14a; see *id.* at 14a n.11.

Judge Siler dissented. In his view, ICC was acting as an agent of Kirby in contracting with Hamburg Sud. Pet. App. 19a. Judge Siler further stated that because it was clear that inland carriers would be used to transport Kirby's machinery, the absence of a specific reference to inland carriers in the Himalaya Clause of the ICC/Kirby bill does not prevent



petitioner from invoking the protection of that clause. *Id.* at 19a-20a. Judge Siler also concluded that because the Hamburg Sud/ICC bill covers transportation from Sydney all the way to Huntsville, it likewise is binding on Kirby and protects petitioner. *Id.* at 20a.

## DISCUSSION

The shipment of goods in this case is representative of a large number of international, multimodal transactions for which uniform rules of law are essential.[1] The courts of appeals presently disagree about the background rules of federal law that should be applied to contractual arrangements like those at issue in this case. Although the case presents significant complexities, this Court's review of the Eleventh Circuit's judgment is warranted to clarify and unify the law.

### I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF MARITIME LAW ON WHICH THE MAJOR MARITIME CIRCUITS ARE DIVIDED

#### A. Genuine Circuit Conflicts Exist

The petition identifies two relevant areas of disagreement among the major maritime circuits. The first conflict, which is the subject of Question 1 in the petition, involves the nature of the relationship that is presumed to exist between a cargo owner and a shipping intermediary (such as ICC) that does not physically transport cargo, when the governing contract and the surrounding circumstances do not clearly establish the nature of that relationship. See Pet. 14-19. The Second, Third, and Ninth Circuits presume an agency relationship in that situation. See *Kukje Hwajae Ins. Co.* v. *The M/V Hyundai Liberty*, 294 F.3d 1171, 1175-1177 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire &*

[1] Multimodal transport, also known as intermodal transport, involves transport by both water and land (or air) under a single bill of lading. See 2 Thomas J. Schoenbaum, *supra*, at 29 n.1.

*Marine Ins. Co.* v. *M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 526-527 (3d Cir. 1994); *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 300-301 (2d Cir. 1984).[2] In this case, the Eleventh Circuit has adopted a conflicting rule, stating that "special particular arrangements" are necessary to demonstrate that the intermediary is acting as an agent of the shipper, rather than as an independent contractor. Pet. App. 9a, 10a.

The second pertinent conflict, which is the subject of Question 2 in the petition, involves the circumstances under which a Himalaya Clause that extends liability limitations to parties other than the carrier is enforceable by third-party beneficiaries. See Pet. 23-26. The Eleventh Circuit denies Himalaya Clause protection to putative third-party beneficiaries that are not in privity of contract with the shipper or carrier, unless they are designated as beneficiaries by a specific description "such as 'stevedore,' 'terminal operator,' etc." Pet. App. 14a n.11. A general description of the third party—"such as 'agent,' 'servant,' or 'independent contractor'"—is not sufficient in the absence of privity. *Ibid.* The Fourth Circuit has suggested a similar specificity requirement when a Himalaya Clause is invoked by a non-maritime entity that provided transport under the bill of lading. See *Caterpillar Overseas, S.A.* v. *Marine Transp. Inc.*, 900 F.2d 714, 726 (4th Cir. 1990).

The Second Circuit has stated more broadly that beneficiaries of a Himalaya Clause must be in "contractual privity with the shipper or carrier." *Mikinberg* v. *Baltic S.S. Co.*, 988 F.2d 327, 333 (1993). The Third Circuit likewise has suggested that contractual privity may be required for a Himalaya Clause to apply. *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 n.9 (1992).

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[2] The Court has invited the Solicitor General to file a brief in the *Green Fire* case, No. 02-813, expressing the views of the United States.



The Ninth Circuit "reject[s] [the] argument that privity of contract is required in order to benefit from a Himalaya Clause, and instead enforces such clauses when the party seeking protection has provided services that are "the carrier's responsibilities under the carriage contract." *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (1998) (quoting *Taisho Marine & Fire Ins. Co.* v. *The Vessel Gladiolus*, 762 F.2d 1364, 1367 (9th Cir. 1985)).

**B. The Conflicts Have Practical Importance**

Those circuit conflicts create serious practical problems for shippers and carriers. "Carriers and cargo interests need to know who bears the risk of potential loss so that they can decide who must insure against it. Insurers need the same information to calculate their premiums." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. Mar. L. & Com. 1, 21 (1988). When courts of appeals disagree, certainty is particularly difficult to achieve in international shipping. As petitioner (Pet. 3 n.1) and amicus Association of American Railroads (Br. 15-16) note, shipowners and other potential defendants (such as the major railroad that is the petitioner in this case) often could be sued in any of several judicial circuits with respect to the same transaction.

Furthermore, multimodal transport and the so-called "container revolution" have made third-party enforcement of Himalaya Clauses critically important in international ocean shipping. As the Court explained in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980), container transport involves "large, reusable metal receptacles [*i.e.*, containers], ranging in length from 20 to 40 feet * * * which can be moved on and off an ocean vessel unopened." *Id.* at 494. Cargo destined for the same location can be packed into a container and only the container—not the individual items of cargo within the container—is physically handled en route to its ultimate destination. The stan-

dardized dimensions of containers make it possible to handle and stow cargo more efficiently, so that ships carry more cargo and are loaded and unloaded in far less time than before. See *id.* at 494-496. The Maritime Administration of the Department of Transportation advises that in Fiscal Year 2002, approximately 28% (by weight) of international waterborne cargo in the United States was containerized.

One consequence of the container revolution is that the water's edge ceases to be "the critical point for the division of functions, costs, and risks." 2 Thomas J. Schoenbaum, *supra*, at 30 (3d ed. 2001). Containerized cargo moves easily and without re-packaging among ships, trains, trucks, and even airplanes. See *id.* at 29-30. In multimodal container shipments, "[t]he critical point is now the place where the container is loaded or 'stuffed.'" *Id.* at 30.

The container revolution also has lent further importance to the role of intermediaries who, in addition to making arrangements for shippers, combine the goods of various shippers into larger loads bound for the same location. Intermediaries enable cargo owners to share in the efficiencies of containerization even if their shipments to particular destinations are infrequent, or too small to fill a container. See *International Longshoremen's Ass'n*, 447 U.S. at 495-496 & n.8; 2 Thomas J. Schoenbaum, *supra*, at 30. Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.*, which requires licensing of certain intermediaries and establishes regulatory oversight of their activities by the Federal Maritime Commission. See 46 U.S.C. App. 1702(17) & 1718.

Due in part to those developments, a single "through bill of lading" commonly covers transport of a shipper's goods all the way to an inland destination. As in this case, the through bill often is issued by a shipping intermediary, which contracts for transport with a vessel-owning carrier. Accordingly, questions concerning the intermediary's authority to act for the cargo owner, and the liability of parties that subcontract with a carrier that is not in contractual privity with



the shipper, are far more likely to arise today than when port-to-port carriage of a particular shipper's goods on a particular vessel was the ordinary focus of a bill of lading.[3]

**C. The Conflicts Are Presented In This Case**

Despite the general importance of the questions presented in the petition, there are threshold issues—which the parties have not addressed—concerning the applicability of federal maritime law in this case and, therefore, the appropriateness of addressing those questions here.

1. The record facts do not preclude the possibility that petitioner's liability could have been determined under statutory rules governing railroad transport. The Carmack Amendment to the Interstate Commerce Act (49 U.S.C. 11706), provides that railroads generally are liable for loss or injury to property, 49 U.S.C. 11706(a), and may limit their liability only under specified circumstances, 49 U.S.C. 11706(c)(1) and (3).[4]

It is unsettled whether the Carmack Amendment applies to land transport under international, multimodal through bills of lading, such as the bills in this case. Compare *Neptune Orient Lines, Ltd.* v. *Burlington N. & Santa Fe Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000) (Carmack Amendment reaches "the inland leg of an overseas shipment conducted under a single 'through' bill of lading * * * to the extent that the shipment runs beyond the dominion of [COGSA]"), and *Berlanga* v. *Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 826-830 (N.D. Tex. 2003) (motor carrier con-

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[3] We are advised by the Department of State that the ongoing international negotiations discussed by the parties (see generally Br. in Opp. 3-4, 21-22, 29-30; Pet. Reply Br. 8), the results of which would have to be implemented through domestic legislation, are not likely to resolve the issues addressed in this brief.

[4] The particular shipments at issue here are exempt from certain regulatory requirements, see 49 C.F.R. 1090.2, but such exempt freight is generally subject to the liability rules of Section 11706, see 49 U.S.C. 10502(e). The Carmack Amendment also established liability rules for motor carriers. See 49 U.S.C. 14706.

text) (same), with *Capitol Converting Equip., Inc.* v. *LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir. 1992) (Carmack Amendment inapplicable when domestic transport is covered by international through bill of lading), and *Swift Textiles* v. *Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986) (motor carrier context) (same), cert. denied, 480 U.S. 935 (1987); see generally *Reider* v. *Thompson*, 339 U.S. 113 (1950).

That uncertainty, however, is not material to this Court's consideration of the instant petition. First, the Carmack Amendment issue was not raised in the lower courts or in respondents' brief in opposition. Accordingly, it has been waived. See S. Ct. Rule 15.2. Second, we are advised by petitioner that the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules. See 49 U.S.C. 10709(b) and (c). Third, data maintained by the Surface Transportation Board reflect that most (approximately 56% by revenue) multimodal, containerized rail freight is transported under such contract-carriage arrangements, to which the Carmack Amendment's liability regime does not apply. In sum, even if the Carmack Amendment's liability rules sometimes apply to rail transport under international, multimodal through bills of lading, they do not apply to a large amount of the cargo carried by railroads under such bills, including, it appears, Kirby's cargo in this case.

2. There also is an unexplored issue whether the courts below were correct in assuming that this case is governed by federal substantive law. A federal rule of decision may be justified "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Meyers* v. *FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); see *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (state remedies must not "work[] material prejudice to the characteristic features of the general maritime



law or interfere[] with the proper harmony and uniformity of that law in its international and interstate relations") (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). It plausibly could be argued that sufficient justification for applying general federal maritime law, rather than the state or foreign law indicated by application of Georgia's choice-of-law rules, exists in this case in light of: the international, interstate nature of the transport contemplated under the bills of lading; the parties' use of the same contract provisions to cover both maritime and land transport; the interrelationship between the bills of lading and COGSA; and the relative importance within the contract of the ocean transport from Sydney to Savannah, as compared with the land transport from Savannah to Huntsville. Cf., *e.g.*, *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) ("[C]ontractual extensions of COGSA are to be construed * * * without reference to state law.").

The Court need not resolve that issue, however. In seeking certification of the district court's liability determination for interlocutory appeal under 28 U.S.C. 1292(b), the parties jointly argued that the correct resolution of the liability-limitation issue turns on questions of federal law that divide the circuits. See Pet. App. 24a; see also Dist. Ct. Joint Mot. to Certify Partial Summ. J. for Immediate Permissive Review 4-7. In the court of appeals, respondents stated that the liability issue "must be determined" by applying principles of maritime law derived from *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). Resp. C.A. Br. 15; see also *id.* at 46 (arguing that this case implicates "competing lines of jurisprudence arising under [COGSA]."). Respondents thus have accepted petitioner's contention that this case involves "questions of federal maritime law." Pet. 2. Because this is a diversity action under 28 U.S.C. 1332(a)(2) and the question of what law applies is not jurisdictional, this Court may rely on the parties' joint position and address the federal-law questions decided by the Eleventh Circuit and presented in the petition.

### D. Carriers And Shippers Do Not Have Viable Means Of Contracting Around The Court Of Appeals' Decision

The result of the Eleventh Circuit's decision is that respondents are able to recover from petitioner without being limited by the COGSA-based cap on liability, even though both bills of lading in this case covered the inland transport during which the damage to Kirby's machinery occurred and contained a $500-per-package liability limitation.

Respondents address the anomaly of that result by suggesting (Br. in Opp. 21) that inland carriers can protect themselves from similar liability by: (1) declining to participate in multimodal transactions; (2) negotiating liability limits directly with cargo owners; or (3) seeking indemnity provisions in their agreements with other carriers. Respondents' first proposal is unworkable on its face. The Department of Transportation advises that multimodal containerized freight comprises approximately ten percent of all rail freight. A major railroad (or trucking line) could not refuse to participate in international multimodal transport and remain viable in the competitive transportation industry. Furthermore, the public interest weighs strongly against rules of law that discourage inland carriers from participating in efficient, lower-cost arrangements for international transport. See *Pennsylvania* v. *ICC*, 561 F.2d 278, 282 (D.C. Cir. 1977) (discussing benefits of "joint through rate tariffs" for ocean and rail transport).

Nor is it feasible for subcontracting carriers to negotiate directly with cargo owners. A single bill of lading often covers multiple containers, each of which may hold goods owned by multiple parties, who may reside in other nations. See generally Ass'n of Am. R.R. Br. 8-9, 13; cf. *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992) (requiring carriers to negotiate with all parties who have an interest in cargo "would impose far



too heavy a burden" and "undermine COGSA's purpose" of creating predictable liability rules) (internal quotation marks omitted).

Indemnity agreements also are not a satisfactory mechanism for providing certainty to subcontracting carriers. The actual value of the goods—and hence the risk associated with an indemnification arrangement—may be known only to the cargo owner(s). Without knowledge of the actual value of the goods, it may be impossible to establish satisfactory indemnification arrangements. Furthermore, the industry practice of setting carriers' liability at COGSA's minimum amount of $500 per package suggests that it is less costly for shippers to insure themselves against losses than for carriers to bear the risk or insure against it. In this case, for example, Kirby obtained insurance to supplement the protection afforded under ICC's bill of lading. It would have been grossly inefficient for petitioner to negotiate with Hamburg Sud for overlapping protection against the same loss.[5]

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[5] Conceivably, the liability issue in this case could have been addressed by a "circular indemnification" arrangement. Under that approach, Kirby would have agreed to indemnify ICC for its losses (in excess of the contractual liability cap) if Kirby recovered in a suit arising from the transport; ICC similarly would have agreed to indemnify Hamburg Sud if Kirby recovered; and Hamburg Sud would have agreed to indemnify petitioner if Kirby recovered. That string of contractual arrangements might have prevented Kirby from suing petitioner, because its potential liability to ICC would offset its potential recovery from petitioner. Such provisions generally have not been adopted by United States carriers, however, and the full chain of indemnifications seemingly would have to be negotiated by the parties (or expected as an industry-standard arrangement) before petitioner could agree to provide transport at a particular rate. Circular indemnification would be a cumbersome way of precluding damages recovery that, as we explain below, should be unavailable in any event.

## II. THE DECISION BELOW IS INCORRECT

### A. The Result Below Is Incorrect In Light Of Kirby's Acceptance Of A Liability Limitation Under The ICC/Kirby Bill Of Lading

1. Kirby's contract with ICC clearly extended the $500-per-package liability limitation to the inland transport of Kirby's goods from Savannah to Huntsville. The ICC/Kirby bill provides that ICC would "perform and/or * * * procure" multimodal transport to Huntsville, Pet. App. 67a (Cl. 2.1(a) and definition of "Freight Forwarder"), and that the bill's liability limitations "apply whenever claims relating to the performance of the contract * * * are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract," *id.* at 67a, Cl. 10.1; see *id.* at 67a, Cl. 10.2 (beneficiaries of Himalaya Clause are deemed parties to the contract). The bill specified an inland place of delivery, *id.* at 66a, and expressly states that Kirby's goods might be transported in separate "stage[s]," *id.* at 67a, Cl. 8.6.a.[6]

If ICC had contracted directly with petitioner for rail transport, there would be little question in the Eleventh Circuit that petitioner could enforce the $500-per-package limitation in the ICC/Kirby bill against Kirby despite its lack of contractual privity with Kirby. See Pet. App. 12a-13a. The result should not be different because ICC instead contracted with Hamburg Sud, which contracted with petitioner. Both ICC's contract with Hamburg Sud and Hamburg Sud's ensuing subcontract with petitioner were anticipated in the ICC/Kirby bill and foreseeable by Kirby.

[6] Petitioner argued in the court of appeals that the relevant bill of lading in this case is the Hamburg Sud/ICC bill, but it preserved the argument, fully addressed by the court of appeals, that the Himalaya Clause of the ICC/Kirby bill applies. See Pet. C.A. Br. 32 ("Kirby cannot allege to have a surviving claim whether in contract or tort, arising out of a portion of the performance of the ICC Ltd. bill of lading[,] after explicitly agreeing by that contract's terms that its damages would be limited to $500.00 per package."). Furthermore, respondents argued in the district court that the ICC/Kirby bill is the relevant contract. See Pet. App. 37a.



2. The court of appeals reasoned (Pet. App. 11a-18a) that, under this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, *supra*, the failure of the ICC/Kirby Himalaya Clause to make specific mention of inland carriers prevents petitioner from obtaining protection under that clause. The Eleventh Circuit has misapplied *Herd*.

In *Herd*, the applicable bill of lading incorporated COGSA's $500-per-package limitation, but only as to the carrier itself. A stevedoring company hired by the ocean carrier dropped a portion of the cargo into the water during the loading process. The cargo owner sued the stevedoring company in tort. The stevedoring company invoked the $500-per-package liability limitation in COGSA, as well as the parallel limitation in the bill of lading. See 359 U.S. at 298-299.

This Court determined that the stevedoring company was not protected under COGSA or the bill of lading because both addressed only the carrier's liability. 359 U.S. at 301-308. In pertinent part, the Court stated that there was "nothing in [the bill of lading] to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence." *Id.* at 302. The Court refused to infer such an extension of the liability limitation in the absence of clear contract language, because such an inference would be contrary to common-law liability rules. *Id.* at 303-305.

Under *Herd*, the carrier's contractual protections do not automatically extend to subcontractors of the carrier. Furthermore, Himalaya Clauses should not be construed to protect third-party beneficiaries "unless the clarity of the language used expresses such to be the understanding of the contracting parties." 359 U.S. at 305 (citation and internal quotation marks omitted). Applying those rules to this case,

the dispositive fact is that clear language in the ICC/Kirby bill extends the protection of the $500-per-package limitation to petitioner as a subcontractor of ICC's chosen ocean carrier. Petitioner is expressly protected under Clause 10.1 as an "independent contractor * * * whose services have been used in order to perform the contract." Pet. App. 67a.

The court of appeals found significance in the fact that petitioner is a railroad, rather than a provider of port services. Pet. App. 15a-17a; accord *Caterpillar Overseas*, 900 F.2d at 726. When a shipper contracts in a single through bill for transport by both sea and land, however, there is no basis for applying a complicated rule of contract enforcement that distinguishes between providers of port services and other providers whose services are equally foreseeable and essential to fulfillment of the contract. Using such a rule to override the plain terms of a Himalaya Clause is inconsistent with *Herd* and fosters harmful uncer tainty in the industry.

**B. The Liability Limitation In The Hamburg Sud/ICC Bill May Provide Alternative Grounds For Resolving The Case**

If the petition is granted and the case is not resolved on the basis of the ICC/Kirby Himalaya Clause, then it would be appropriate to consider petitioner's ability to enforce the liability limitation in the Hamburg Sud/ICC bill, which is incorporated into petitioner's carriage agreement.

1. This Court's decision in *Great Northern Railway Co.* v. *O'Connor*, 232 U.S. 508 (1914), suggests that, when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder." *Id.* at 514. Such a rule would be consistent with the common law's allowance of "fair, open, just and reasonable agreement[s]" under which shippers obtain lower rates in exchange for limiting carrier



liability, *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509 (1913), and harmonious with the rule that tariff limitations on railroad liability are conclusive, see, *e.g.*, *Feinberg* v. *Railway Express Agency*, 163 F.2d 998, 999 (7th Cir. 1947) (railroad's receipt for mink coat "was binding on it as to the charge it could make and on the [owner] as to the amount she could collect in case of loss"), cert. denied, 332 U.S. 847 (1948). If contract limitations on carrier liability were not enforceable against cargo owners, then the availability of reduced transport rates as a *quid pro quo* for limited carrier liability would be put at risk.

Furthermore, as the Second Circuit explained when discussing potential tort liability in a case involving air cargo, carriers who accept goods from intermediaries generally are "entitled * * * to assume" that the intermediary has authority to accept the terms of carriage, and "[f]rom the perspective of the [carrier, the cargo owner] is an unforeseeable plaintiff." *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 62 n.4 (2d Cir. 2000). It would not be reasonable to expect petitioner to review ICC's contract with Kirby to assess its own potential liability to Kirby. Rather, petitioner could justifiably rely on the protections it negotiated with the party (Hamburg Sud or a subsidiary thereof) that presented the goods for shipment by rail.

2. For the reasons given above, it would not be necessary for the Court to reach the agency question framed in the petition (see Pet. 14-23) in order to resolve the case on the merits. If the Court does address that issue, however, its analysis should consider the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* Codifying the regulatory approach of the former Federal Maritime Board (the predecessor to the Federal Maritime Commission), see *Common Carriers by Water—Status of Express Cos., Truck Lines, and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961); *Bernhard Ulmann Co.* v. *Porto Rican Express Co.*, 3 F.M.B. 771 (1952), the Shipping Act provides that maritime businesses may be common carriers, regulated as such, even if they do not own

or operate any ships. The Shipping Act creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarders" and "non-vessel-operating common carriers" (NVOCCs). Ocean freight forwarders arrange for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). Implementing regulations of the Federal Maritime Commission provide that if an ocean freight forwarder is identified in the bill of lading as a shipper, its agency relationship with the original shipper must be indicated as well. 46 C.F.R. 515.42(a). The Shipping Act further provides that NVOCCs operate and are regulated as common carriers, but NVOCCs do not own the vessels used for transport and they are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B).

ICC's status as an NVOCC *vel non* therefore may bear on the agency issue discussed in the petition. Cf. *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949) (discussing role of freight forwarders under Interstate Commerce Act). Yet the parties seem to agree that the record facts do not conclusively establish whether ICC was acting as an NVOCC. See Br. in Opp. 16; Pet. Reply Br. 5-6 n.4; see also Pet. App. 10a n.9. That factual uncertainty is an additional reason why the agency issue may prove to be an unsuitable ground for resolving the case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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